SUPREME COURT, U. S.

APR 10 1967

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1246

CYNTHIA J. THARAUD and LUCIEN R. THARAUD,
Petitioners,

—against—

CHAUNCEY REAL ESTATE CO. LTD. and SARAH M. STEWART, as Administratrix of Goods, Chattels and Credits of William A. Stewart,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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To the Honorables, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners herein respectfully pray that a writ of certiorari issue in the above-captioned case, directed to the Court of Appeals of the State of New York, to review its order dated and entered in the office of the Clerk of that court on January 12, 1967. (See Appendix B and certified record submitted herewith.)

Opinions Below

There were no opinions in the courts below except the dissenting opinion of Mr. Justice Schwartzwald in the Appellate Term of the Supreme Court of the State of New York, Second Department, which is unreported and is printed in Appendix A hereto.

Jurisdiction

The order of the Court of Appeals, which finally determined this case in New York, was dated and entered January 12, 1967 and is printed in Appendix B hereto. Therefore the time within which this petition for a writ of certiorari might be filed will expire on April 12, 1967. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257.

Nature of Case and Proceedings Below

This is an action brought in Civil Court of the City of New York, Kings County, by respondents on an oral contract relating to real estate services to be rendered by respondents, a corporation and one of its principal officers,* in a New York County Supreme Court stockholders derivative litigation in which petitioner Cynthia J. Tharaud was plaintiff and which involved two basic issues: the sale value and the rental value of certain real estate.

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* W. A. Stewart died pending appeals below and appears as respondent herein by his Administratrix.

The principal issue in this action is whether the corporate respondent earned its money, i.e., whether it performed the terms of the oral contract or whether it breached the oral contract, refused to perform and brought suit before time for performance had expired. Two counterclaims of petitioner Cynthia J. Tharaud are involved, for $6,500. and $7,100., respectively.

The terms, performance and breach of the oral contract and even the parties to it were in sharp dispute before and at the trial. Respondents claimed that each of respondents and each of petitioners were parties to the contract, that the agreed price was $3,500., that respondents performed the contract and that a balance of $3,200. was due. Petitioners, on the other hand, claimed that the contract was between corporate respondent and petitioner Cynthia J. Tharaud who acted through her attorney, her co-petitioner herein, as her disclosed agent, that the terms required performance of services by corporate respondent through to complete conclusion of the derivative litigation including appeals and testimony in the expense proceeding therein, and that respondents breached the contract by refusing to perform and by bringing suit before time for its full performance had expired, i.e., while the derivative suit was still pending, before all appeals were determined and before the testimony in the expense proceeding had been taken.

Petitioner Cynthia J. Tharaud's two counterclaims are respectively (1) for $6,500. against corporate respondent as damages for breach of contract including amounts incurred and paid by her to other persons to do the work under the contract which respondent re-

fused to do and (2) for $7,100. against respondent Stewart for inducing corporate respondent to breach its contract with her.

In the course of the jury trial herein, as the respondents' sole witness, the respondent Stewart, was leaving the stand at the end of respondents' direct case and before any of petitioners' evidence had been presented or heard, the foreman of the jury, an architect, said to Stewart in open court and in the presence and hearing of other jurors,

"You earned your money."

Petitioners' attorneys promptly moved for a new trial on the ground that the jury foreman's remark was grossly improper, evinced prejudice and prejudging of the case before hearing any of petitioners' evidence, and could prejudice other jurors and made it impossible for the petitioners to have a fair trial by an unprejudiced jury. These motions were denied and petitioners were compelled to proceed for the next six days with their case, both in defense and on the counterclaims, at the end of which the same motions were again made and denied.

The trial judge made no attempt at any time during the trial to remove the prejudicial effect of the jury foreman's remark either by admonishing the jury to disregard it or otherwise.

The jury retired for four hours of deliberation and returned a split verdict of 11 to 1 in favor of corporate respondent for $3,200. plus interest and against the petitioner Cynthia J. Tharaud on her counterclaims.

Petitioners' motions to set aside the verdict and for a new trial on the ground that the jury foreman's remark was prejudicial and made it impossible for petitioners to have a fair trial by an unprejudiced jury were denied.

Judgment was entered February 2, 1965 for $4,521.50. Petitioners appealed on the limited ground that they had been deprived of their constitutional right to trial by an unprejudiced jury by the remark of the jury foreman and that a new trial should have been ordered. Although two of the three justices of the Appellate Term of the New York Supreme Court, Second Department, affirmed without opinion, Mr. Justice Schwartzwald, the third justice, dissented in an opinion and voted for reversal and a new trial

> "... upon the ground that the gratuitous comment of the jury foreman to one of the plaintiffs as he was leaving the witness stand that 'You earned your money' was improper and prejudicial under the circumstances." (Appendix A.)

The said Appellate Term unanimously granted petitioners' motion for leave to appeal to the Appellate Division, Second Department, which affirmed without opinion by order of October 24, 1966. Petitioners, by notice dated November 28, 1966 appealed to the Court of Appeals

> "relying solely upon the questions directly involving the construction of Article 1 of the Constitution of the State of New York and Amendment VII of the Constitution of the United States, i.e., whether the defendants were deprived of their constitutional rights guaranteeing them

a fair trial by an unbiased and unprejudiced jury."

Respondents rejected the notice of appeal; the petitioners moved to compel them to accept it and respondents cross moved to dismiss the appeal. On January 12, 1967, the New York Court of Appeals granted, without opinion, the respondents' cross motion on the ground that "no substantial constitutional question is presented". (Appendix B). This is the determination sought to be reviewed by this petition.

Questions Presented

1. In a civil case for breach of contract where plaintiff sues for services rendered and defendant urges that plaintiff did not perform the contract and therefore did not earn his money, if the foreman of the jury in open court at the end of plaintiff's direct case and before hearing any of defendant's evidence, says to the plaintiff, the sole witness, as plaintiff is leaving the stand, in the presence and hearing of other jurors "You earned your money", is not the defendant deprived of his constitutional right to a jury trial by an unprejudiced jury if the trial judge denies defendant's prompt motion for a new trial on the ground that the remark was prejudicial, evinced prejudice, could prejudice other jurors and made it impossible for the defendant to have a fair trial by an unprejudiced jury?

2. Did the New York Court of Appeals err in dismissing the appeal on the ground that no substantial constitutional question was involved when the

Notice of Appeal raised the question whether the jury foreman's remark in open court, in the presence and hearing of other jurors "You earned your money" made to respondents' sole witness, respondent Stewart, as he was leaving this stand at the close of respondents' case, after hearing respondents' evidence and before hearing any of defendants' evidence, was prejudicial, evinced prejudice of the foreman, could prejudice other jurors and deprived defendants of their constitutionally guaranteed right to a fair trial by an unprejudiced jury?

3. Does not the New York Court of Appeals decision seriously impair the right of a litigant to a fair trial by an unprejudiced jury in a civil case?

4. Is not the New York Court of Appeals decision at variance with the law laid down by the New York and Federal courts?

Constitutional Provisions Involved

United States Constitution, Seventh Amendment:

> "In suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ."

Constitution of the State of New York Article 1, section 2:

> "Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; . . ."

How Constitutional Questions Raised

The constitutional questions were raised by affidavit in the trial court, by notice of appeal and by briefs in the Appellate Term, by briefs in the Appellate Division, by notice of appeal and affidavits in the New York Court of Appeals (see certified record submitted herewith, affidavits of L. R. Tharaud, ver. December 7, 1966, pp. 8-9 and Exhibits 6, 7 and 9 and ver. December 29, 1966, pp. 1-2).

The Reasons for Granting the Writ

The right of a litigant, entitled to a jury trial, to trial by an unbiased and unprejudiced jury is fundamental. Trial by a prejudiced or biased jury is no trial at all. This right is just as basic in a civil as in a criminal trial.

Statements made by jurors in open court in the course of the trial which indicate or evince bias and prejudice or prejudgment of the case or statements heard by jurors which may tend to bias or prejudice the mind, taint the jury hearing the case and make it impossible for the parties to receive the constitutionally guaranteed fair trial by an unbiased and unprejudiced jury. As the court, in *Pool* v. *Chicago R. Co.*, 6 Fed. 844 (Circ. Ct., Iowa, 1881), said, p. 850,

> "But where the natural tendency of what a juror does or says or willingly listens to from others is to bias his mind, or where his misconduct evinces a prejudgment of the case, or ill will,

> or passion against the losing party, the inference of prejudice in the true sense inevitably follows, because the verdict cannot be said to be the result of a fair trial. There is no right more sacred than the right to a fair trial. There is no wrong more grievous than the negation of that right."

The court, in *U.S.A.* v. *Clark,* 343 Fed. 2nd 90 (CCA 3rd 1965), said, in connection with a prejudicial statement made in the presence of a jury,

> "The only way that the defendant can be protected against the strong possibility of harm from the improper occurence at trial for which it was in no way responsible is by having a new trial."

Thus, it is plain that even when only the possibility of prejudice exists as the result of an improper statement made in open court in presence of a jury, a new trial should be granted.

In the instant case, the evidence of prejudice was far stronger than a possibility. The jury foreman's statement "You earned your money", made in open court after hearing respondent's evidence and before hearing any of the defendant's evidence, was a statement that the foreman, an architect, felt that the respondent should recover in the case, since the issue in the case was: had the respondents earned their money, i.e., had they performed their contract or had they failed to perform their contract. Moreover, the statement was heard by and could prejudice other jurors. Yet, despite this grossly improper and prejudicial statement, the petitioners' motion for a new

trial on the grounds of prejudice was denied and the petitioners were compelled to present their case for six additional days before a jury the foreman of which had evinced prejudice and as to the members of which there was a strong possibility that prejudice could exist.

Additionally, in the instant case, there was a split verdict by the jury (11-1). Concerning such a circumstance, one New York court said, in *Sheehan* v. *Doyle,* — Misc. —, 152 N.Y.S. 2nd 931 (N.Y. Sup. Ct., N.Y. Co. 1956), at pp. 933-4,

> "The law is too well established to require detailed discussion that a trial juror is required to evaluate the evidence adduced *during a trial* in a completely unbiased manner. . . . *This is particularly true in this case since the verdict of the jury was not unanimous.* . . . In Knickerbocker v. Erie R. Co., 247 App. Div. 495, 286 N.Y.S. 1001, 1002, the court stated: 'It is the cardinal principle of our common law that trial jurors shall be entirely unbiased; and when bias is disclosed, *even after a verdict,* the courts do not hesitate to set verdicts aside. Slater v. United Traction Co., 172 App. Div. 404, 157 N.Y.S. 909; McGarry v. City of Buffalo, 70 Hun 597, 24 N.Y.S. 16.' " (Ital. added)

While the amount of money involved in this case is relatively small, the right of parties to trial by an unprejudiced jury in a civil case guaranteed by the constitution is a right of great substance and importance.

In the present day, when there is properly much concern about congested calendars and about delayed justice being no justice at all, there is a danger that in the desire to achieve speedy justice, fundamental rights may be overlooked. Limiting jury trials, for example, may relieve calendar congestion, but where the basic right to a jury trial constitutionally exists impairment of that right is improper and unconstitutional.

The New York Court of Appeals in an early case said that legislation authorizing a "trial by a jury partial or biased against either party, would be in violation of one of the essential elements of the jury referred to in and secured by the Constitution." (*Stokes* v. *People,* 53 N.Y. 164, 172.) Certainly, a decision by a court approving a trial when the jury is biased or prejudiced is no less in violation of the Constitution than legislation authorizing such a trial.

The decision of the New York Court of Appeals in the instant case that no "substantial" constitutional question is presented must, we submit, have the result of impairing the right of a litigant in a civil case to a fair trial by an unbiased and unprejudiced jury. This right is not only "substantial", it is vital and represents the quintessence of a constitutional right granted both by the United States Constitution, Amendment Seven and the New York Constitution, Article One.

In addition, while petitioners have found no reported federal or New York case with a factual background identical with that involved in the instant case, there is authority in New York and in the federal courts which dictates that the New York Court of

Appeals was in error and that in fact a substantial constitutional question is involved herein and that a new trial should have been granted on the ground that the defendants were deprived of their constitutionally guaranteed right to trial by an unprejudiced and unbiased jury.

In *Lewy* v. *Gillespie*, — Misc. —, 170 N.Y.S. 534 (App. Term 1st Dept. 1918), a suit by plaintiff-attorney for recovery for professional services rendered, a juror asked the plaintiff, during cross examination:

> "A Juror: What are you fighting about, Counsellor? He says all the time that they have no money. Why are you suing for $840., when they have no money?"

The Appellate Term, in reversing the lower court's denial of plaintiff's motion for a new trial on the ground that the remark indicated prejudice, said,

> "It seems to us that the interrogation of the juror in question was so indicative of bias and prejudice on his part as to warrant the conclusion of his inability to give fair consideration of the testimony in the case, and under the circumstances the motion to withdraw a juror should have been granted."

In the instant case, the remark of the jury foreman was far more indicative of prejudice and bias than the remark of the juror in the *Lewy* case. Here the jury foreman's statement "you earned your money" was a plain statement by the juror that the respondent should recover, made before any evidence of the petitioners had been presented.

The federal cases indicating that the New York Court of Appeals decision was in error are:

Pool v. *Chicago R. Co.,* 6 Fed. 844 (Circ. Ct., Iowa, 1881) (quoted and discussed *supra* pp. 8-9)

U.S.A. v. *Clark,* 343 Fed. 2nd 90 (CCA 3rd 1965) (quoted and discussed *supra* p. 9)

Petitioners urge that the right to a jury trial by an unbiased and unprejudiced jury in a civil case is a valuable, basic, and substantial constitutional right, that the right has been violated in the case at bar, and that the right should not be sacrificed but, in view of its importance, should be carefully preserved.

Conclusion

It is respectfully submitted that the constitutional issue herein requires this honorable Court to grant the writ sought.

Respectfully submitted,

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Of Counsel

APPENDIX A

Dissenting Opinion of Mr. Justice Schwartzwald in the Appellate Term, Second Department

New York Law Journal—Friday, March 18, 1966

Schwartzwald, J., dissents and votes for reversal and a new trial upon the ground that the gratuitous comment of the jury foreman to one of the plaintiffs as he was leaving the witness stand that "You earned your money" was improper and prejudicial under the circumstances.

APPENDIX B

Order Dismissing Appeal

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twelfth day of January A.D. 1967.

Present, HON. STANLEY H. FULD,
Chief Judge, presiding.

2 Mo. No. 21

CHAUNCEY REAL ESTATE CO. LTD., and SARAH M. STEWART, as Administratrix &c., of William A. Stewart,

Respondents,

vs.

LUCIEN R. THARAUD and CYNTHIA J. THARAUD,

Appellants.

A cross-motion having heretofore been made herein upon the part of the respondents to dismiss the appeal taken by the appellants in the above cause to this Court, papers having been submitted thereon and, after having heard Lucien R. Tharaud, Esq., in opposition thereto and there having been no appearance on the oral argument in support of said motion, due deliberation having been thereupon had, it is

Appendix B

ORDERED, that the said cross-motion be and the same hereby is granted and the appeal dismissed, with costs and ten dollars costs of motion, upon the ground that no substantial constitutional question is presented.

A copy

RAYMOND J. CANNON
Clerk

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Respondents.

RESPONDENTS' OPPOSING BRIEF

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TN 7—3322

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OTHER AUTHORITIES CITED

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Respondents.

RESPONDENTS' OPPOSING BRIEF

Respondents oppose the application for a writ of certiorari herein upon the following grounds:

1st: because the petition fails to disclose any special or important reason therefor, as required by Rule 19 of the Rules of the Supreme Court of the United States;

2nd: because this Court does not acquire jurisdiction under Title 28 U.S.C. Sec. 1257, inasmuch as there is not involved any principle the settlement of which is of any importance to the public as distinguished from that of the parties, and because no one has ever questioned,—nor do respondents now question—the right of a litigant to a trial by an unbiased and unprejudiced jury;

3rd: because the Order of the Court of Appeals of the State of New York, dated January 12th, 1967 (Petitioners'

Appendix B), was not the Order which finally determined the cause. The cause was finally determined by the Order of the Appellate Division of the Supreme Court, Second Department, dated October 24, 1966, which affirmed without opinion, the Order of the Appellate Term of the Supreme Court, which affirmed the Judgment of the Civil Court of the City of New York, for the County of Kings. (Under the laws of the State of New York, a defeated litigant could appeal to the New York Court of Appeals only by permission of the Appellate Division where the case originated is a Court lower than the Supreme Court, and if that Court denied such leave the litigant could not appeal for permission to the Court of Appeals. Petitioners complied with but without waiting for a ruling by said Appellate Division, petitioners appealed to the New York Court of Appeals, *as of right.* The right to appeal to that Court is governed by Article 56 of the Civil Practice Laws and Rules of the State of New York. That Article limits the jurisdiction of the Court of Appeals to certain cases, and Section 5601 provides for appeals to that Court—as of right—in only 3 instances—to wit: under Sub. (a) where there has been a dissent, reversal or modification of a lower Court's decision by an Appellate Division of the Supreme Court, under Sub. (b) where the appeal is on Constitutional grounds,—and then in the following 2 instances only:

"1. from an Order of the Appellate Division which finally determines an action where there is directly involved the construction of the Constitution of the State or of the United States; and

2. from a judgment of a Court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the State, or of the United States, under the Constitution of the State or of the United States",

and under Sub. (c) where the appeal to that Court is from an Order granting a new trial or hearing, provided the appellant stipulates for judgment absolute in the event said Order is affirmed by said Court of Appeals.

The Appellate Division, Second Departmnt, denied petitioners' application for leave to appeal to the Court of Appeals; and that Order finally determined the action.)

Evidently anticipating this result, petitioners served a Notice of Appeal to the Court of Appeals,—*as of right.* But because of the limitation placed by the Statute upon petitioners' right to appeal to the Court of Appeals—as of right,—respondents (both here and in the New York Court of Appeals) moved for the dismissal of the appeal which the petitioners attempted to take to the Court of Appeals, as of right, upon the ground that under Sub. (b) of Sec. 5601 of the Civil Practice Laws and Rules (CPLR) of the State of New York, no constitutional questions were presented,—namely, (1) that the Order of the Appellate Division of October 24, 1966, which finally determined the action, did not directly involve the construction of the Constitution of the State of New York, or of the United States, and (2) that the judgment which finally determined the action did not involve on the appeal the validity of any statutory provision of the State of New York or of the United States (Appendix 1). It was for that reason that the Court of Appeals of the State of New York dismissed petitioners' appeal, because no substantial question,—as limited by the Statute,—had been presented to it (Appendix B annexed to Petition) as required by the New York Statute, to give that Court jurisdiction.

The Opinions Below

Despite petitioners' claim (on p. 2) that there were no opinions in the Courts below, the transcript of the Record should show (26-page Record, submitted with Affidavit of

Benjamin Machinist in Support of Cross-Motion to Dismiss Appeal to Court of Appeals; pp. 4 and 5) that when the juror made the remark which petitioners claim indicated bias and prejudice, and upon which all appeals of the petitioners were hinged, it followed by about 30 minutes a remark made by the Trial Court,—in the presence of the jury, the litigants and their counsel,—which remark is referred to in the Trial Court's ruling, made when petitioners moved for the withdrawal of a juror, because of said juror's remark. That ruling reads as follows:

> "I made a statement earlier this morning to the effect that sometimes people don't believe judges and jurors earn their money. I think when this man left the stand, this juror,—after Mr. Stewart had been on the stand for a couple of days, without a predetermined attitude in the trial, without fixing his mind as to how he is going to determine the facts in this case, said casually, without malice, and, I don't think, without proper thought, 'you earned your money.' I do not think it is sufficiently strong for me to declare a mistrial."

And the Trial Court thrice during the trial, gave this same opinion when motions were made and repeated, for a mistrial.

The authorities which we believe support this ruling, are hereinafter cited.

Jurisdiction

This Court's jurisdiction is improperly invoked under Title 28 U.S.C. Section 1257, inasmuch as there is not drawn into question the validity of any provision of the Constitution of the United States or of the State of New York, and because the Order of the Court of Appeals of the State of New York (Appendix B annexed to Petition) shows petitioners' appeal to that Court was improperly

made, and was dismissed upon the ground that no substantial constitutional question was presented, as required by Section 5601 of the New York Civil Practice Laws and Rules.

Nature of the Case and Proceedings Below

The nature of respondents' suit and the judgment entered thereon are not in issue. Petitioners took no appeal therefrom. But petitioners' statement of the nature of the action is vague, and too general to present the real issues which were involved.

The action was brought by respondent Chauncey Real Estate Co. Ltd. (hereinafter "Chauncey") for the balance due it under an oral contract, made in August 1956, to appraise certain real estate located in Brooklyn, Kings Co., New York, N. Y., and to testify in support thereof in a stockholder's derivative action brought by Mrs. Tharaud. Chauncey claimed it fully performed said services. The derivative action was tried by Mr. Tharaud in October 1958,—and lost. On January 18, 1959, Chauncey billed Mr. Tharaud for the services rendered the agreed price of $3,500. On January 19, Mr. Tharaud acknowledged receipt of the bill, without dispute. $300 was paid on account. In the meantime appeals were taken to the Appellate Division of the Supreme Court, and thereafter an application was made to the Court of Appeals for leave to appeal to it,—which was denied. After fruitless demands for payment of the agreed fee, Chauncey sued in May, 1961, for the balance of $3,200.

Both petitioners appeared in the action by Mr. Tharaud as their attorney, serving separate Answers,—with Mrs. Tharaud interposing a counterclaim for $4,700, claiming that because Chauncey, through its Vice President William A. Stewart had failed to assist with the briefs to the Appellate Division and on her application for leave to appeal to the Court of Appeals, she was forced to hire others to do

the work which Mr. Stewart,—the appraiser,—had refused to do, at a cost to her of $4,700. But in a Bill of Particulars which she had been ordered to furnish, she alleged she became obligated to her husband,—the petitioner Lucien R. Tharaud,—for that amount.

At the trial, petitioner Lucien R. Tharaud testified that when Chauncey's summons was served on his wife, he sent her a bill for services rendered during the year preceding the date the summons had been served upon her, in the sum of $9,900,—so she could plead a counterclaim against Chauncey, but he never explained why the counterclaim was for only $4,700 when his bill was for $9,900. But the counterclaim was made to appear even more ridiculous when there was read to the Jury a letter Mr. Tharaud had written to Mr. Stewart the day after he received respondent's bill, in which he wrote:

> "Dear Mr. Stewart:
>
> I have your letter of Jan. 15th and with bill enclosed, and am turning it over to my client Mrs. Tharaud.
>
> In accordance with our conversation I'm advising her the bill will include incidental assistance which we may need in connection with the appeal briefs."

For this "incidental assistance" Mrs. Tharaud later amended her Answer to increase her one counterclaim for $4,700, to two counterclaims,—for $6,500 and $7,100 respectively.

At the trial, Mr. Stewart was Chauncey's only witness. His direct testimony was followed by 2½ days of rigid and repetitious cross-examination by Mr. Tharaud. About one-half hour before this cross-examination was concluded, the Trial Court made the remark heretofore referred to, and when Mr. Stewart left the witness stand, after 3½ days of examination and cross-examination, the juror made the remark to which petitioners complain.

A recess followed, during which Mr. Tharaud moved for a mistrial, claiming the remark of the juror was improper, and showed bias and prejudice.

The trial Court denied the motion, and made the ruling hereinbefore stated.

After 9 more days of trial, at which Mrs. Tharaud did not testify,—she having been in Court only on the first day,—the Jury was charged, and after a lapse of 4 hours, of which almost 2 hours were consumed by their going out to a restaurant for lunch,—they brought in a eleven to one verdict in respondents' favor,—the 12th man having voted in favor of the respondents, but only against Mr. Tharaud.

Petitioners then appealed to the Appellate Term of the Supreme Court on the limited ground that the remark of the juror, standing alone, evinced bias and prejudice (Appendix 2). They then attempted to settle a record of some 26 pages, which merely recited the daily appearances of the parties during the 12 day trial,—the juror's remark, —their motions for a mistrial,—and the trial Court's ruling thereon. The trial Court rejected this abbreviated Record, and petitioners took a second appeal,—this time from the Order requiring an adequate Record (Appendix 3).

These Notices of Appeal, and the proposed abbreviated Record, in themselves, show that no constitutional questions were raised by petitioners—said appeals being specifically limited to the single question whether the statement of the juror, standing alone, evinced bias and prejudice.

Under the second appeal, the Appellate Term of the Supreme Court of the State of New York, Second Department, affirmed the trial Court's Order, unless petitioners, in addition, submitted the summations of counsel and the Court's Charge.

Petitioners complied with that Order, which added some 223 pages to the Record. But in their Brief, and upon the argument of the appeal before the Appellate Term, petitioners limited themselves to the argument that the juror's remark, standing alone, evinced bias and prejudice.

After the Appellate Term affirmed, petitioners, upon leave granted, appealed to the Appellate Division of the Supreme Court, Second Department; and it was only in connection with their application for leave to appeal to the Appellate Division that petitioners, for the first time, referred to the Constitution of the United States and of the State of New York (Appendix 4), but failed to set forth any constitutional question.

The Questions Presented

The questions presented by petitioners (on pp. 6 and 7) of their present application were not presented to the Appellate Term, and could not be raised by the petitioners for the first time on their appeal to the Appellate Division of the Supreme Court of the State of New York.

Questions 2, 3 and 4 (on p. 7) are without merit because New York's Civil Practice Law and Rules heretofore cited, limited the Court of Appeals to hearing appeals, *as of right,* to the 3 instances therein cited.

Constitutional Questions Were Raised Late

Petitioners' claim, that the constitutional questions were raised by affidavit in the trial Court, is inaccurate, and without merit, because it was not until the 3rd day of the trial that the juror made the remark (on Jan. 19th, 1965); the petitioners' Notice of Appeal (Appendices 2 and 3) do not indicate that any constitutional question was involved; and their recital of 2 affidavits verified in Decem-

ber, 1966, clearly relate to events which occurred after the affirmance by the Appellate Division of the Order of Affirmance by the Appellate Term (p. 5 of Petition).

Cases Cited by Petitioners Not in Point

The cases cited by petitioners are not in point. *Lewy* v. *Gillespie* (170 N. Y. Supp. 534, not officially reported; cited on p. 12), involved a case where an attorney was suing for a fee of $840 and the jury brought in a verdict for $50. It was decided in 1918, and certinly is not controlling in view of the later cases cited herein.

Sheehan v. *Doyle* (152 N. Y. Supp. 2nd 931, not officially reported; cited on p. 10), involved the misconduct of one of the jurors who voted for plaintiff, in failing to disclose during his examination as a prospective juror the settlement of a negligence claim made by him against N.Y.U., as a result of injuries which he allegedly sustained, which settlement was less than a month prior to the trial in which he sat, which enabled him to sit on the jury by fraud.

And in *Stokes* v. *People* (53 N. Y. 164, at p. 172)—which is not in point—the quotation cited by petitioners (on p. 11) was a comment induced by a claim that a statute which provided that the previous formation or expression of an opinion in reference to the circumstances upon which any criminal action at law is based, shall not be a sufficient ground for challenge for principal cause, to any person who is otherwise legally qualified to serve as a juror, who may have formed or expressed or had such an opinion, provided such person shall declare on oath that he verily believes that he could render an impartial verdict according to the evidence submitted to the jury on such trial, and that such previously formed opinion would not bias or influence his verdict, and provided the Court was satisfied that the person so proposed as a juror did not entertain such a present opinion as would influence his verdict as a juror and the

Court pointed out that even though such facts would not be sufficient cause for a challenge for principal cause, there still was the right to challenge for favor. And in that case the reversal was not because of anything applicable to an impartial or partial juror, but was based on an erroneous charge to the jury.

Authorities Supporting Trial Court's Ruling

Ordinarily, a claim of bias or prejudice is based on a juror's state of mind previous to his being accepted as a juror, as where he conceals a fact which if revealed, would have made him unfit to sit as a juror, or where he failed to make answer to a question which would have made him ineligible to serve as a juror in the particular case.

Sheehan v. *Doyle* (152 N. Y. Supp. 2d 931).

But where a juror makes a remark as a result of what he has seen or heard during the course of the trial itself, indicating at most an impression produced upon his mind by the testimony given up to that time, it does not indicate that he is prejudiced, or that he will not be guided by the subsequent testimony in reaching a conclusion.

Opinions formed by jurors during the course of a trial, as facts are disclosed to them, are no cause for charging them with bias. A claim that money is due, by one who appears honest, will create one impression; the subsequent production of a bona fide receipt proving payment of the amount claimed would easily destroy that impression.

A motion for a new trial, as a general principle, is addressed primarily to the conscience and sound judicial discretion of the trial Judge before whom such a motion is made, and irregularities in the conduct of the jury, not shown to have prejudiced the substantial rights of a defendant, will not vitiate the verdict. (*Bowers Judicial Discretion of Trial Courts,* Sec. 531.)

In *People* v. *Spiegel*, 149 Misc. (N. Y.) 439; aff. 243 App. Div. 595, the Court said (at p. 445):

> "Corpus Juris, Volume 16, Sec. 2651 says: 'The expression of an opinion adverse to defendant during the trial, or while deliberating upon the verdict, or after the verdict does not necessarily show that the juror was prejudiced at the time he was sworn, and does not of itself require a new trial.'"
>
> * * * *
>
> "It gives another illustration. 'A remark of a juror in the presence of the other jurors not based on any independent information but simply an inference drawn from the statement of the accused and the evidence is not ground for a new trial as showing prejudice. (State v. Redeau, 116 La. 245.)'"

On page 446 the Court continued:

> "In Wharton on Criminal Procedure, Vol. 3 (10th Ed.), 2235, we find the statement:
>
> 'Juror expressing opinion during the progress of the cause, after the evidence was opened as to the guilt of the defendant, in the hearing of bystanders, it was held that though in so doing he was guilty of gross misconduct, it was no cause to set aside the verdict. Com. v. Gallagher, 4 Pa. L. J. 512; 2 Clark (Pa.) 297. See State v. Ayer, 23 N. H. (3 Frost) 301. Brakefield v. State, 33 Tenn. (1 Sneed) 215.'"

and on page 447 the Court continued:

> "In 16 Ann. Cases, pages 175, 176, the Editor's footnote to McKahan v. Baltimore & Ohio RR Co. (223 Pa. St. 1), dealing with an 'Expression of Opinion or Prejudice by Juror during Trial as Ground for New Trial', states:

> 'Remarks that do not indicate any bias or prejudice in the mind of the juror previous to the trial, but discloses only the impressions produced upon his mind by the evidence adduced, do not constitute ground for a new trial. * * * If the entertainment of an opinion on the subject matter of a trial by a juror during its progress, furnished ground for new trial, no litigated matter could be brought to a close, for from the very constitution of the human mind opinions will be formed, as facts are disclosed or reasons addressed to the understanding liable to be and frequently change, as these facts and reasons are met and confuted by others of an opposite tendency. Com. v. Gallagher, 3 Clark 127. 4 Pa. L. J. 511, wherein it was held that the fact that after the testimony on the part of the Commonwealth was closed, and a part of the prisoner's given, a juror entertained an opinion that the accused was guilty, was no reason for granting a new trial.' ''

In *Mayer* v. *Liebman* (16 App. Div. 54, 2d Dept. N. Y.), a juror during the course of the trial, said to defendant's medical expert:

> "We heard what the physician said yesterday, He said what was pretty correct, with all due respect to you.",

and the defendant's attorney claimed this remark showed such bias on the part of the juror as made it the duty of the Court to withdraw him, and thus suspend the trial, and moved to set aside the verdict.

The Appellate Division, Second Department, in affirming the Judgment for plaintiff, said:

> "We do not take this view of the circumstances, * * *",

and the Court there held that the mere statement, standing alone, did not indicate bias or prejudice.

In *Weaver* v. *Scripture* (125 Misc. N. Y. 741, aff. 214 App. Div. 852), the Court said:

> "This brings us to the other ground upon which this motion is made, namely that the jury was biased, and that defendant did not have a fair trial because of such bias and prejudice. The basis of this claim is an alleged assertion by Mr. Corts, one of the jurors, who was heard to remark while the case was on trial that the defendant was an official referee, drawing a salary of $5,000 a year, and 'What's a $1,000 to him?' "
>
> "Mr. Corts denied making the assertion.
>
> "Assuming however, that the statement was actually made, would that be a sufficient ground upon which to set aside this verdict? I think not. A casual remark of that kind does not to my mind necessarily indicate bias, nor is it evidence that the jury as a whole, or that this particular juror, did not consider defendant's case on the merits. We must assume, until the contrary appears, that a juror follows the instructions of the Court, and bases its verdict upon the evidence."

And in the case at bar, the Record should show that the trial Court cautioned the Jury that it was their duty to disregard any impression that they might form as to the opinion of any other person, not sustained by the evidence.

Conclusion

Because the Petition fails to disclose any special reason therefor, and because the only question involved in the case at bar, based on the appeals taken by the Petitioners (Appendices 2, 3 and 4) was "Did the juror's remark, standing alone, indicate bias and prejudice?" and because all the New York Courts involved have answered the

question in the negative; and their rulings are sustained by the authorities hereinbefore cited, we respectfully submit that this Court should deny the writ sought, with costs.

Respectfully submitted,

ROBERT MOERS,
Attorney for Respondents,
369 Lexington Avenue,
New York, N. Y. 10017.

TN 7—3322

BENJAMIN MACHINIST,
Of Counsel.

APPENDIX 1

Cross-Motion to Dismiss Appeal to Court of Appeals (N. Y.)

COURT OF APPEALS OF THE STATE OF NEW YORK

CHAUNCEY REAL ESTATE CO. LTD., and SARAH M. STUART, as Administratrix of Goods, Chattels and Credits of William A. Stewart,

Plaintiffs-Respondents,

vs.

LUCIEN R. THARAUD and CYNTHIA J. THARAUD,

Defendants-Appellants.

SIR:

PLEASE TAKE NOTICE that upon the Judgment of the Civil Court, Kings County, entered February 2, 1965, the defendants' Notice of Appeal to the Appellate Term, Second Department, dated February 25, 1965, the Order of Affirmance of the Appellate Term, dated April 14, 1966, the Order of the Appellate Term granting defendants leave to appeal to the Appellate Division, Second Judicial Department, dated April 29, 1966, the Order of Affirmance of said Appellate Division dated October 24, 1966, and the defendants' Notice of Appeal to this Court, dated November 28, 1966, copies of all of which are annexed to defendants-appellants' motion papers for an Order directing plaintiffs-respondents to accept their Notice of Appeal to this Court, and other relief, returnable January 3rd, 1967; and upon the Record on Appeal herein to the Appellate Term, and the Order of the Appellate Division, Second Judicial Depart-

ment, dated December 5, 1966 denying defendants' application for leave to appeal to this Court, or to amend its Order, copies of which are submitted herewith, and upon the annexed affidavit of Benjamin Machinist, sworn to the 22nd day of December, 1966, the plaintiffs-respondents will Cross-Move at a term of this Court, to be held at the Court House thereof, at Albany, New York, on the 3rd day of January, 1967, at the opening of Court on said day, for an Order dismissing said defendants-appellants, Notice of Appeal to this Court, with costs, upon the ground that no Constitutional question, within the meaning of the Statute, Sec. 5601 of the C.P.L.R. was raised or is involved in this action, and granting this Cross-motion, with costs.

Dated, New York, December 22nd, 1966.

BENJAMIN MACHINIST,
Attorney for Plaintiffs-Respondents,
Office and P. O. Address,
369 Lexington Avenue,
New York, N. Y. 10017.

TN 7—3322.

To:

LUCIEN R. THARAUD,
Attorney for Defendants-Appellants,
90 Broad Street,
New York, N. Y. 10004.

WH 4—2170.

APPENDIX 2

Notice of Appeal.

CIVIL COURT OF THE CITY OF NEW YORK,

COUNTY OF KINGS.

CHAUNCEY REAL ESTATE CO. LTD., and WILLIAM A. STEWART,

Plaintiffs,

against

LUCIEN R. THARAUD and CYNTHIA J. THARAUD,

Defendants.

Index #8359/61

CITY COURT

SIRS:

PLEASE TAKE NOTICE, that the above named defendants, Lucien R. Tharaud and Cynthia J. Tharaud, hereby appeal to the Appellate Term of the Supreme Court, Second Judicial Department, from so much and such part of a judgment entered in the office of the Clerk of the Civil Court of the City of New York, County of Kings, on the 2nd day of February, 1965, in favor of the plaintiff, Chauncey Real Estate Co. Ltd., and against the said defendants adjudging that the plaintiff, Chauncey Real Estate Co. Ltd., recover from the said defendants the sum of $3,200.00, with interest of $1,152.00, making a total of $4,352.00, together with costs and disbursements amounting to $161.50, making in all a total sum of $4,521.50, and dismissing defendant Cynthia J. Tharaud's counterclaims against plaintiffs Chauncey Real Estate Co. Ltd. and William A. Stewart and this appeal is further limited to the

question "whether so much and such part of said judgment was erroneous and improper and should be vacated, set aside and reversed because of the repeated refusals of the trial judge to order a new trial during the trial and after the trial in the interests of justice on motions of the defendants" based on fact that a statement made by the foreman of the jury, in open court and in the presence of the other jurors, to plaintiff Chauncey Real Estate Co. Ltd.'s sole witness at the trial, William A. Stewart, as said witness was leaving the witness stand at the end of plaintiffs' direct case was improper and indicated that said foreman had prejudged the case in favor of plaintiff Chauncey Real Estate Co. Ltd. and against the defendants before hearing any evidence on behalf of the defendants and that said foreman was biased and prejudiced in favor of plaintiff Chauncey Real Estate Co. Ltd. and against the defendants, and that it is the intention of the defendants to "appeal from only so much and such part of said judgment limited to the question whether the said repeated refusals of the trial judge to order a new trial during and after the trial in the interests of justice on motions of defendants on the basis that the said statement made by the foreman of the jury was wholly improper and made it impossible for the defendants to receive a fair trial and that the deefndants do not appeal from any other part of said judgment."

February 25, 1965.

Yours, etc.,

Lucien R. Tharaud,
Attorney for Defendants,
Office and P. O. Address,
90 Broad Street,
New York 4, N. Y.

Appendix 2.

To:

BENJAMIN MACHINIST, Esq.,
Attorney for Plaintiffs,
Office and P. O. Address,
369 Lexington Avenue,
New York 17, N. Y.

CLERK OF THE CIVIL COURT
OF THE CITY OF NEW YORK,
Kings County,
120 Schermerhorn Street,
Brooklyn, N. Y.

APPENDIX 3.

Notice of Appeal.

CIVIL COURT OF THE CITY OF NEW YORK,

COUNTY OF KINGS.

Index #8359/61

CITY COURT

CHAUNCEY REAL ESTATE CO. LTD., and WILLIAM A. STEWART,
Plaintiffs,

against

LUCIEN R. THARAUD and CYNTHIA J. THARAUD,
Defendants.

SIRS:

PLEASE TAKE NOTICE, that the above named defendants, Lucien R. Tharaud and Cynthia J. Tharaud, hereby appeal to the Appellate Term of the Supreme Court, Second Judicial Department, from an order of this Court, docketed in the office of the Clerk of the Civil Court of the City of New York, County of Kings, on the 14th day of April, 1965, filed with said Clerk April 12, 1965 and dated April 9, 1965 (a) granting plaintiffs' motion to vacate defendants' Notice of Settlement, dated March 23, 1965, of the Proposed Record on Appeal which included the judgment for $3200 and interest entered February 2, 1965 and the transcript duly filed March 16, 1965 in the office of said Clerk, said Notice of Settlement and said Proposed Record on Appeal each being referred to in said order dated April 9, 1965, each being part of plaintiffs' moving papers herein and each thereby being part of the appeal record on this Notice of Appeal and (b) directing defendants to furnish a copy of the entire transcript of the trial at an additional cost of over $2000 despite the fact that said Proposed Record on Appeal was based on a Notice of Appeal, dated February 25, 1965 which narrowly limited the extent of that appeal from the said judgment to a comment, contained in

said transcript filed March 16, 1965, made by the foreman of the jury to the plaintiffs' sole witness as he was leaving the stand at the end of plaintiffs' case, less than half way through the trial and before hearing any evidence on behalf of the defendants, which comment indicated bias, prejudgment and prejudice in favor of plaintiff Chauncey Real Estate Co. Ltd. and against defendants thereby making it impossible for the defendants to have a fair trial by an unbiased jury and to the trial judge's refusals to order a new trial on the ground that said comment of the jury foreman was wholly improper, grossly prejudicial to defendants and made it impossible for them to have, and deprived them of, a fair trial by an unbiased jury and said Notice of Appeal dated February 25, 1965 specifically stated that defendants did not appeal from any other part of said judgment and this appeal is taken from the whole of said order, dated April 9, 1965, and from each and every part thereof.

Dated: April 15, 1965.

Yours, etc.,

LUCIEN R. THARAUD,
Attorneys for Defendants,
Office and P. O. Address,
90 Broad Street,
New York 4, N. Y.

To:

BENJAMIN MACHINIST, Esq.,
Attorney for Plaintiffs,
Office and P. O. Address,
369 Lexington Avenue,
New York 17, N. Y.

CLERK OF THE CIVIL COURT OF THE CITY OF NEW YORK,
KINGS COUNTY,
120 Schermerhorn Street,
Brooklyn, N. Y.

APPENDIX 4.

Notice of Motion for Leave to Reargue or for Leave to Appeal to the Appellate Division.

APPELLATE TERM OF THE SUPREME COURT,

SECOND JUDICIAL DEPARTMENT.

Cal. #774

November Term, 1965

CHAUNCEY REAL ESTATE CO. LTD., and WILLIAM A. STEWART,

Plaintiffs-Respondents,

vs.

LUCIEN R. THARAUD and CYNTHIA J. THARAUD,

Defendants-Appellants.

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of Lucien R. Tharaud, verified April 12, 1966, the judgment entered in the office of the Clerk of the Civil Court of the City of New York, County of Kings, on the 2nd day of February, 1965, the order of the Appellate Term, Second Department, dated and entered the 18th day of March, 1966, affirming, with Mr. Justice Schwartzwald dissenting, the said judgment, the written opinion of Mr. Justice Schwartzwald in support of said dissent, the record on appeal to said Appellate Term and upon the briefs filed therein and upon all the papers, pleadings and proceedings herein, defendants-appellants will make a motion at a term of the Appellate Term of the Supreme Court, Second Department for the hearing of motions to be held at the Courthouse

of the Appellate Term, Second Department, Brooklyn, N. Y. on the 22nd day of April 1966 at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for reargument of the appeal herein on the ground that this Court has overlooked or misapprehended important facts and questions of law or in the alternative for an order granting leave to the defendants-appellants to appeal to the Appellate Division, Second Department, from said order of the Appellate Term entered March 18, 1966 in the interests of justice and upon the ground that serious and novel questions of law are involved including questions of deprivation of rights to a fair trial by an unbiased and unprejudiced jury under the U. S. and New York Constitutions, questions of conflict between the decisions of this Department and those of the First Department and certifying that in the opinion of said Appellate Term questions of law are involved which ought to be reviewed by the Appellate Division, Second Department as provided by law, together with such other and further relief as may be proper.

PLEASE TAKE FURTHER NOTICE that answering affidavits must be served five days before the return day.

Dated: New York, N. Y., April 12, 1966.

Yours, etc.,

LUCIEN R. THARAUD,
Attorney for Defendants-Appellants,
90 Broad Street,
New York, N. Y. 10004.

To:

BENJAMIN MACHINIST, Esq.,
Attorney for Plaintiffs-Respondents,
369 Lexington Avenue,

New York, N. Y. 10017.